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In the Supreme Court
OF THE
United States

OCTOBER TERM 1977

No. 78-87

ENVIRONMENTAL DEFENSE FUND, INC.; OCEANIC SOCIETY; SAVE THE AMERICAN RIVER ASSOCIATION; PETER ZARS; LUCRETIA EDWARDS; and JEAN SIRI,
Petitioners,

vs.

EAST BAY MUNICIPAL UTILITY DISTRICT; DEWITT KREUGER; ROBERT T. NAHAS; A. C. CARRINGTON; G. HOWARD ROBINSON; CHARLES J. WRIGHT; JOHN S. HARNETT; and DOES I THROUGH XX,
Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION

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Respondents East Bay Municipal Utility District, DeWitt Kreuger, Robert T. Nahas, A. C. Carrington, G. Howard Robinson, Charles J. Wright, and John S. Harnett oppose the Petition of Environmental

Defense Fund, Inc., Oceanic Society, Save the American River Association, Peter Zars, Lucretia Edwards, and Jean Siri for a writ of certiorari to review the judgment and opinion of the California Supreme Court rendered in this case on February 23, 1978.

Pursuant to Rule 40(3), this opposition omits separate reference to the opinions below and incorporates the appendices of the Petition.

JURISDICTION

This Court should not assume jurisdiction in that the judgment for dismissal challenged in the Petition is adequately supported on the basis of state law, independent of the federal issue decided.

QUESTIONS PRESENTED

1. Does the decision of the California Supreme Court in this case conflict with the opinion of this Court in *California v. United States,* October Term, 1977, No. 77-285, decided July 3, 1978?

2. Are federal water projects, mandated by Congressional legislation and constructed and operated pursuant to the terms and conditions of water appropriation permits issued by the State of California, subject to challenge by private persons purportedly on the basis of state law when such challenge is raised outside of and independently from the administrative scheme established under state law to administer and adjudicate water appropriation rights in California

and with the express intention of thwarting and frustrating the federal projects?

STATUTES INVOLVED

In addition to statutes recited in the Petition, pertinent provisions of the Reclamation Act of 1902 and all acts amendatory thereof or supplementary thereto (43 U.S.C. 371, et seq.), the American River Basin Development Act (Public Law 81-356; 63 Stat. 852), and the California Water Code, are set forth infra in Appendix I.

COUNTERSTATEMENT OF THE CASE

In their efforts to construe a conflict between this Court's recent decision in *California v. United States* and the California Supreme Court opinion in *Environmental Defense Fund, et al. v. East Bay Municipal Utility District, et al.,* Petitioners have failed to mention important facts which significantly distinguish these two cases.

In *California v. United States,* this Court was asked to resolve the question of whether the State of California, in issuing a permit to appropriate water, could impose any conditions on the United States. The United States had sought a declaratory judgment to the effect that it need not comply with or adhere to some 25 conditions which the State of California had imposed on the federal government's water appropriation permit.

No such challenge to state authority is present in *EDF v. EBMUD*. There is no issue as to whether the United States is bound by the terms of its permits from the State. Nor has any party hereto suggested that the United States has violated the terms of its permit.

Rather, what Petitioners are asserting is that California's *private citizens* (who claim no ownership of water rights) may sue to nullify a contract of the United States for delivery of water from a federal project specifically mandated by Congress. Such legal action, Petitioners suggest, may be prosecuted without including the United States or the State of California as a party, and *after* the United States has applied for and received water appropriation permits for its project from the California State Water Resources Control Board ("the State Board").[1] As this Court

[1]In describing the State Board's role as the state agency charged with administering California's water appropriation laws, this Court acknowledged that:

> "Under California law, any person who wishes to appropriate water must apply for a permit from the State Water Resources Control Board. Cal. Water Code Sections 1201 and 1225. The Board is to issue a permit only if it determines that unappropriated water is available and that the proposed use is both 'reasonable' and 'beneficial' and best serves 'the public interest.' Cal. Water Code Sections 1240, 1255, and 1375; Cal. Const. Art. X, Section 2. In determining whether to issue a permit, the Board is to consider not only the planned use of the water but also alternative uses, including enhancement of water quality, recreation, and the preservation of fish and wild life. Cal. Water Code Sections 1242.5, 1243, and 1257. The Board can also impose such conditions in the permit as are necessary to ensure the 'reasonable' and 'beneficial' use of the water and to protect 'the public interest.' Cal. Water Code Sections 1253 and 1391." *California v. United States*, October Term 1977, No. 77-285, decided July 3, 1978, Slip op., n. 7 at 6.

has correctly observed, it is the State Board which determines whether the proposed use is in accordance with state law, including Article X, Section 2, of the California Constitution.

Respondent East Bay Municipal Utility District (EBMUD) is a public agency created under the California Municipal Utility District Act (California Public Utilities Code Sections 11501, et seq.) and governed by an elected Board of Directors. EBMUD delivers a water supply for the domestic, industrial and fire protection needs of approximately 1,100,000 residents in the urban communities of Alameda and Contra Costa Counties, and it operates a "secondary" waste water treatment facility known as Special District No. 1.

In furtherance of these purposes, EBMUD has full power to enter into contracts, including contracts to cooperate with and to accept cooperation from the federal government. The California Legislature has expressly empowered EBMUD to "do any and all things necessary in order to avail itself of such aid, assistance, and cooperation under any federal legislation now or hereafter enacted" (California Public Utilities Code Sections 12721 and 12844).

In 1970, in order to meet the projected water needs of its service area, EBMUD entered into a contract with the United States whereby EBMUD agreed to buy project water upon completion of the federal Folsom South Canal project on the American River in California. Pursuant to the contract, delivery of the water to be purchased by EBMUD is from the

Folsom South Canal (CT 616:642).[2] The canal has in fact been completed to the turn-out point provided for under the contract, and EBMUD has been making the prescribed payments under the contract terms since 1974.

EBMUD's federal contract for delivery of water through this canal for municipal use is in full conformity with the legislative directives of the United States Congress. In authorizing the Secretary of the Interior to construct, operate and maintain an Auburn-Folsom South unit on the American River (as an integral part of the federal government's Central Valley Project in California) Congress expressly directed that "the principal works of the unit *shall* consist of—

* * *

(6) The Folsom South canal and such related structures, including pumping plants, regulating reservoirs, floodways, channels, levees, and other appurtenant works for the delivery of water as the Secretary determines will best serve the needs of Sacramento and San Joaquin Counties: *Provided,* That the Secretary is authorized to include in such canal and related operating structures such additional works or capacity as he deems necessary and economically justified to provide for the future construction of the East Side division of the Central Valley project, and the incremental costs of providing additional works or capacity in the Folsom

[2]"CT" references are to pages of the Clerk's Transcript on Appeal, filed with the California Supreme Court.

South Canal to serve the East Side division of the Central Valley project shall be assigned to deferred use for repayment from Central Valley project revenues. In the event that the East Side division is authorized, such costs shall be deemed a part of the cost of that division and shall be reallocated as the Secretary deems right and proper. 43 U.S.C. Sec. 616aaa."[3]

In conjunction with the operation of such projects, and payment of the construction costs, the Secretary is specifically authorized to enter into contracts to furnish water for a municipal water supply (43 U.S.C. Sec. 485 h (c)). Moreover, in 1949, when the Central Valley Project was reauthorized by the American River Basin Development Act to include a Folsom Reservoir, there was included a provision for water supply to lands and municipalities within Alameda and Contra Costa Counties (Public Law 81-356, Sec. 2; 63 Stat. 852, Sec. 2.) EBMUD is located within these two counties. Congress has directed that the Auburn-Folsom South Unit shall be integrated and coordinated from both a financial and an operational standpoint with the other features of the Central Valley Project to effectuate the fullest, most beneficial, and most economic utilization of the water

[3]One of the conditions of EBMUD's federal contract makes EBMUD responsible for construction of a canal, known as the Hood-Clay Connection, if federal and state authorities do not build it and if the Bureau of Reclamation determines the canal to be necessary. The canal is an integral part of the proposed East Side Division of the Central Valley Project. The agreement further commits EBMUD to actively support congressional authorization and federal construction of the East Side Division, including the Hood-Clay Connection (CT 876, lines 4-9; CT 634-640).

resources made available by it (43 U.S.C. Sec. 616 bbb). The feasibility studies presented to the Congress, after having been previously reviewed by the State of California, specifically contemplated a supply to the San Francisco Bay Area as being available from the Auburn-Folsom South Unit (HR Doc. 305, 87th Cong. 2nd Sess., 15; HR Doc. 171, 88th Cong., 1st Sess., 17; Hearing before State Water Res. Control Board July 20, 1971, Tr. Vol. V, p. 268, lines 18-26).

In furtherance of the Auburn-Folsom South project, and prior to contracting with EBMUD for the delivery of federal project water, the United States Bureau of Reclamation ("the Bureau") applied for and (after extensive hearings) received from California's State Board permits to appropriate water of the American River. These permits authorize an appropriation of sufficient water to meet the United States' contractual obligations to EBMUD and they provide supplemental water to the United States' Central Valley Project.

By its decisions granting the permits to the United States, California's State Board implicitly found that proposed appropriations by the United States were reasonable, beneficial, and in the public interest (see footnote 1, supra). In reliance on those permits the Bureau and EBMUD entered into the contract which the Petitioners seek to nullify. Subsequent to execution of the contract the Bureau completed the Folsom South Canal to the point of delivery to EBMUD, and EBMUD has ever since made the payments required of it under its contract with the United States.

The decisions of the State Board have long been final and have never been attacked by Petitioners. In fact, Petitioner Save the American River Association, and the County of Sacramento (also a party to this case in the proceedings before the California Supreme Court) intervened in a state court mandamus action to *support* one of these decisions, Decision 1400. One of the County's principal contentions in its complaint in the mandamus action states:

> Decision 1400 of the State Board, as clarified by Order of May 4, 1972, was lawful, proper, and required by the public interest, by the facts and by the law. CT 542, lines 2-4.

Having never contested the United States' appropriation permits as issued by the State of California for the Auburn-Folsom South project; and having made no allegation that the United States (or the Secretary of the Interior) is acting contrary to such permits, to California law, or to the authorizations of Congress—Petitioners are seeking to challenge the legality of the federal government's water deliveries in a cause of action addressed solely against EBMUD. In this "end-run" effort to undermine a federal contract for delivery of project water, the proposition is that EBMUD has violated California law by contracting to receive water from the United States through the Folsom South Canal, rather than at some point further downstream.

Specifically, Petitioners allege in their Complaint that delivery of project water to EBMUD through

the Folsom South Canal violates the prohibitions of Article X, Section 2, of the California Constitution against unreasonable use of water, because the water will not be available to flow down to the lower American River for multiple use. Petitioners allege further violation of Article X, Section 2, stating that EBMUD's contract for project water from the American River contributes to the likelihood the Bureau of Reclamation will complete its construction of the Auburn-Folsom South Project and undertake construction of the East Side Division. These federal projects, allege Petitioners, "will have myriad negative environmental and social effects . . ." (CT 10).[4] Relying on these allegations Petitioners seek to invalidate the Bureau-EBMUD contract on the basis of its terms and conditions (20 C.3d at 340; App. A of Petition at 15).

In sustaining the trial court's dismissal of Petitioners' Complaint, the California Supreme Court concluded that Petitioners' reliance upon California law to invalidate EBMUD's contract with the United States is preempted by federal law, in that it constitutes an attempt to interfere with projects which Congress has expressly directed the Bureau to undertake (20 C.3d at 340; App. A of Petition at 15-16).

[4]Another cause of action asserted in Petitioners' Complaint, which is not a part of the Petition for a Writ of Certiorari, alleges that EBMUD's failure to develop water reclamation facilities as a means of supplementing its water supply violates Article X, Section 2, and specified provisions of the California Water Code.

ARGUMENT

I.

THERE IS NO CONFLICT OF DECISION

A. The Holding of the California Supreme Court is Consistent with California v. United States.

Petitioners assert that the California Supreme Court's decision in *EDF v. EBMUD* is inconsistent with the holding of this Court in *California v. United States* that Section 8 of the Reclamation Act of 1902, 43 U.S.C. Sec. 372, 383, requires the Secretary of the Interior "to appropriate, purchase or condemn necessary water rights in strict conformity with state law," and that "distribution [of water] to individual landowners would again be controlled by state law" (Petition at 14). However, the particular facts of this case, as well as the specific holding of the California Supreme Court, fully substantiate that the suggested conflict is illusory.

First, and very important, there is the distinction that in carrying out the directives of Congress—to construct, operate, and maintain the Auburn-Folsom South unit and its Folsom South Canal—the Secretary of the Interior has appropriated the necessary supplies of water from the American River in "strict conformity with California law." As previously noted, the State of California has issued the requisite appropriation permits (allowing for the Bureau's contemplated water contract with EBMUD) and Petitioners do not claim that the permits are invalid or that the United States has violated their terms and

conditions.[5] Nor has the California Supreme Court suggested in any manner that the State of California does not have the authority to impose conditions upon appropriations by the United States.

Furthermore, *California v. United States* establishes that Section 8 of the Reclamation Act does *not* permit the states to impose conditions on the United States which are inconsistent with clear congressional directives respecting federal reclamation projects. In the words of this Court:

> Congress did not intend to relinquish total control of the actual distribution of the reclamation water to the States.
>
> * * *
>
> In previous cases interpreting Section 8 of the 1902 Reclamation Act, however, this Court has held that state water law does not control in the distribution of reclamation water if inconsistent with other congressional directives to the Secretary. See *Ivanhoe Irrigation District v. McCracken,* 357 U.S. 275 (1958), *City of Fresno v. California,* 372 U.S. 627 (1963). We believe that this reading of the Act is also consistent with the legislative history and indeed is the preferable reading of the Act. Slip op., n. 21 at 22-23.

[5]The significance of this distinction was well stated in trial court's opinion:

> "If, on the other hand, the United States is complying with the state laws relied on by plaintiffs in acquiring the American River water, then any basis for a cause of action tends to evaporate. Only if the federal government's acquisition of the water violated applicable state law might we be forced with a question of whether EBMUD's purchase of such water also violates state law. As already mentioned, no such violation by the federal government is urged here" (CT 885-886; App. C of Petition at 99).

The California Supreme Court (having concluded that federal law preempts Petitioners' state law challenge to the construction of projects expressly directed by Congress) is clearly in conformity with *California v. United States.* The Court's opinion specifically holds that Petitioners' application of California law is inconsistent with Congressional directives to construct the Auburn-Folsom South unit, the East Side Division, and the Folsom South Canal:

> Insofar as both complaints attempt to invalidate the contract on the basis of its terms and conditions, the above principles require our finding preemption. As noted, *they challenge both construction of Hood-Clay Connection and choice of diversion point. Plaintiff's complaint seeks rescission partially on the ground the EBMUD-Bureau contract will contribute to the likelihood the Bureau will complete development of the East Side Division, an integral part of the Central Valley Project specifically authorized by Congress.* (43 U.S.C. Sec. 616aaa et seq.).

The federal reclamation laws clearly establish that construction and maintenance of water facilities are vested in the Bureau. (E.g., 43 U.S.C. Sec. 390b(b) [projects constructed by Bureau of Corps of Engineers]; *id.* Sec. 616aaa [Secretary of Interior to construct, operate, and maintain Central Valley Project, American River Division].) *The determination of diversion point obviously concerns construction of the federal project. The location of the diversion point in fact comprises a substantial part of the federal project.* Similarly, construction and location of the Hood-Clay Connection are clearly within the au-

> thority invested in the Secretary of the Interior and the Bureau. *The alleyations the EBMUD-Bureau contract will facilitate the Bureau's completion of the Central Valley Project on its face represent attempted interference with the Bureau's completion of a project Congress has directed it to undertake.* Accordingly, we conclude that the complaint fails to state a cause of action insofar as it seeks invalidation of the contract on grounds that under state law construction of the canal or placement of the diversion point assertedly involve an unreasonable water use. 20 C.3d at 340; App. A of Petition at 15-16. (Emphasis added.)

It is particularly significant that this conflict with Congressional directives, which the California Court has identified, was not initiated by the State of California. The State, in issuing its permits to the United States, has implicitly determined that the proposed water uses are "reasonable" and "beneficial" (California Water Code Sections 1240, 1255, and 1375; California Constitution, Article X, Section 2—Petition at 4-5). Rather, the conflict arises from the random and independent challenges of *private* citizens, who claim no water rights in the American River, but who are construing California law so as to frustrate the Folsom South Canal project long after the United States has satisfied the requirements imposed by the State.

There is nothing in the decision of *California v. United States* which supports the disruptive application of California law which Petitioners seek to sus-

tain. If Petitioners are permitted to pursue this collateral attack upon the American River and Central Valley projects, it will no longer be enough for a federal appropriator to obtain a permit from the State to appropriate unappropriated water and to build and operate a mandated project in strict compliance with the permit's terms. Long after the federal government's permit becomes final, its project constructed, and the contracts entered into for the use of the water and the financing of the project, Petitioners would have such project vulnerable to desultory attacks by private parties contending that the purchasers should have obtained their water supply at some other location. The California Supreme Court has rejected this chaotic result and has done so in full compliance with the holding of this Court in *California v. United States.*

B. The California Supreme Court Has Properly Construed Prior Cases Decided By This Court.

Petitioners seek review herein urging that the California Supreme Court has misconstrued *prior* cases decided in this Court (Petition at 11). It is not the function of the United States Supreme Court to correct inconsequential errors contained in a lower court opinion, particularly where the decision is in conformity with the most recent pronouncements of this Court. The burden and responsibility of the United States Supreme Court are obviously too great to entertain a review and correction of every purported misstatement made by the lower courts in the application of accepted principles.

In their zeal to find a conflict between *EDF v. EBMUD* and *California v. United States* Petitioners have focused all too narrowly upon the California Court's analysis of certain cases. As the California Court made very clear, each case discussion was not determinative of the final result. *Ivanhoe Irrigation District v. McCracken* (1958) 357 U.S. 275, said the State Court, expressly left open "the broader questions argued by the parties" in this case (20 C.3d at 336; App. A of Petition at 10). The California Court dismissed *City of Fresno v. California* (1963) 372 U.S. 627, commenting that "the case holds that state law was preempted because of the federal eminent domain and delegated contract powers. . . . The present case does not concern the federal government's eminent domain authority" (20 C.3d at 337; App. A of Petition at 11).

What Petitioners completely overlook is the ultimate holding of the *EDF v. EBMUD* opinion—that California law is preempted by the federal Reclamation Act only to the extent that its application represents attempted interference with congressional directives (20 C.3d at 340; App. A of Petition at 16).

It comes as no surprise that without the benefit of this Court's reasoning in *California v. United States,* the California Court reached a result which is precisely in accord with this Court's subsequent interpretation of the federal law. The State Supreme Court's decision reflects the fact that the State Attorney General provided the Court with a copy of the State's appellate brief in *United States v. California,* Ninth

Circuit No. 75-3554, for use in deciding *EDF v. EBMUD* (App. II). The California Court has manifestly adopted the State's position in *United States v. California* that California has the power to condition the Bureau's appropriation of state waters, provided state law is not inconsistent with Congress' reclamation laws and policies.[6]

It is the explicit consistency of the California Court's holding with this Court's recent decision which is of foremost importance here, not whether the discussion of the cases in the two opinions is identical. Nevertheless, EBMUD submits that the California Court's case analysis, in addition to its holding, in *EDF v. EBMUD* fully comports with this Court's interpretation of prior cases in *California v. United States.*

As to both *Ivanhoe,* supra, and *Fresno,* supra, the California Court firmly concludes:

> *Ivanhoe* establishes that under Section 8, inconsistent state law may not be applied to defeat a specific and mandatory congressional directive. . . .
>
> Similarly, *City of Fresno v. California* (1963) 372 U.S. 627 [10 L. Ed. 2d 28, 83 S. Ct. 996], fails

[6]Specifically, the argument set forth in California's briefs before the United States Court of Appeals, and later before the United States Supreme Court, was that:

> "Section 8 of the Reclamation Act of 1902 Requires the Bureau of Reclamation to Comply with State Laws Relating to the Appropriation and Distribution of Project Water, to the Extent That Such Laws Are Not Inconsistent with Congress' Reclamation Laws and Policies" (Brief for the Appellants, State of California, et al. in *United States v. California,* U.S. Court of Appeals for the Ninth Circuit, No. 75-3554, at 16).

> to support the construction of Section 8 urged by the parties. Like *Ivanhoe,* it holds that state law may not be applied so as to defeat a specific and mandatory congressional directive. In addition, it extends the preemption doctrine by holding state laws preempted when they impair powers delegated to the administrator (20 C.3d at 336; App. A of Petition at 10).

This interpretation follows exactly this Court's reading of *Ivanhoe* and *Fresno* that "state water law does not control in the distribution of reclamation water if inconsistent with other congressional directives to the Secretary" *(California v. United States,* Slip op. n. 21, at 22-23).[7]

In discussing *Arizona v. California* (1963) 373 U.S. 546, the California Court refers to this Court's acknowledgment that allowing too great a scope to state law would endanger federal project objectives. In the words of this Court, as quoted in the California decision:

> 'Subjecting the Secretary to the varying, possibly inconsistent commands of the different state legislatures could frustrate efficient operation of the project and thwart full realization of the benefits

[7]Petitioners have flatly misstated the *EDF v. EBMUD* opinion by suggesting that the California Court's interpretation of *Ivanhoe* is "that section 8 does not permit the states to determine who may receive water from a federal project and under what conditions" (Petition at 12). On the contrary, the California Court has clearly recognized the authority of a state to impose conditions which are not inconsistent with federal directives. As to *Ivanhoe,* the California Court concluded that the case did not address itself to the question of whether or not a state could frustrate a federal project by undermining federal contracts with state agencies.

> Congress intended this national project to bestow.' 20 C.3d at 338; App. A of Petition at 13.

As Petitioners point out, *California v. United States* disavows language in *Arizona* "to the extent that it would prevent petitioner [the State of California] from imposing conditions on the *permits* granted to the United States which are not inconsistent with congressional provisions authorizing the project in question" (Slip op. at 28; Petition at 14). (Emphasis added.) However, the California Supreme Court's holding is clearly consistent with *California v. United States* in that it does not curtail the State's permit authority.

In the final analysis, what *EDF v. EBMUD* holds is that a federal project cannot be thwarted by the varying demands of private persons whose personalized application of Article X, Section 2, of the California Constitution is inconsistent with Congressional directives *and* the permits issued for such project by the State. Therefore, the question presented here is not one of weighing State requirements against Congressional directives to determine if an inconsistency exists; for the California Court has correctly identified a direct conflict (created independently from the State) in this case, stating emphatically that it is Petitioners' avowed intention to thwart and to interfere "with the Bureau's completion of a project Congress has directed it to undertake" (20 C.3d at 340; App. A of Petition at 16).

II.

THIS CASE IS NOT A PROPER SUBJECT FOR REVIEW BY THIS COURT IN THAT IT WAS PROPERLY DISMISSED BY THE TRIAL COURT ON THE BASIS OF STATE LAW.

Although it was held that the pleadings in this action may be dismissed as preempted by federal law (20 C.3d at 340; App. A of Petition at 14-15), the case is also appropriately resolved on the basis of state law. The trial court decision, which was upheld by the California Supreme Court, holds *independently of the federal issue* that Petitioners fail to assert a valid cause of action on the basis of Article X of the California Constitution. The trial court's opinion succinctly summarizes the fatal flaw in Petitioners' reliance upon Article X:

> In short, the amendment [Article X] extended the rule of reasonableness to all water rights [citations omitted].
>
> But to recognize that does not help plaintiffs. It does not help them because water rights are not involved here. Defendants claim no water rights in the American River; the parties are not rival claimants to property rights in the water of the river. Article XIV, Section 3 [now Article X, Section 2] provides a basis for settlement of such rival claims. It delineates a basic water rights policy. The cases applying the constitutional provision concern competing claims to water rights. They provide no basis that I can discern for turning Article XIV, Section 3 into a broad environmental charter that extends to water purchasers. CT 890-891; App. C of Petition at 106-107.

Therefore, the trial court held that "even if federal law were not controlling, no violation of state law by defendants has been established" (CT 874; App. C of Petition at 82; see also 20 C.3d at 333, App. A of Petition at 5).

That state law (independently of federal law) requires the dismissal of this case is further supported by the rationale upon which the California Supreme Court upheld dismissal of Petitioners' "waste water" cause of action.[8] The California Court concluded that Petitioners' application of Article X, Section 2, in regard to "waste water" was not properly before the courts—that Petitioners were obliged to exhaust their administrative remedies before the State Water Resources Control Board.

The California Legislature, explains the Court, has established "a thorough statutory system ensuring reasonable water allocation and safeguarding water purity, commensurate in scope with the Constitutional provision [Article X]:"

> The statutes vest the State Water Resources Control Board (SWRCB) with full authority to 'exercise the adjudicatory and regulatory functions of the State in the field of water resources' [Citations omitted]. It has been granted broad authority to control and condition water use, ensuring utilization consistent with public interest. (Wat. Code, Section 1257.) This authority includes protection of the environment. (Id.) The SWRCB's powers extend to regulations of water quality and

[8] As previously noted (footnote 4, supra) Petitioners' complaint included an assertion that EBMUD's failure to reclaim waste water violated Article X.

prevention of waste. (E.g., Wat. Code, Sections 100, 275.) It has adopted administrative regulations to prevent waste and unreasonable use. (Cal. Admin. Code, tit. 23, Sections 764.10-764.13.) 20 C.3d at 342; App. A of Petition at 18-19.[9]

The California Court then emphasizes that to extend concurrent jurisdiction over this area of water resources to the state courts would impair the comprehensive administrative system established by the Legislature to guarantee reasonable water use and purity:

[9]Before the State Board can issue a water appropriation permit it must comply with extensive notification requirements (California Water Code Secs. 1300-1324). The notices must contain, among other things, the source of supply, the amount applied for, the location of the point of diversion, and the use and the location of the place of use. There is provision for publication and for posting and mailing of the notice (California Water Code Secs. 1310, 1320). "Any person interested" may file a written protest against the approval of the permit application (California Water Code Sec. 1330). "Any person interested in any application may, within thirty days after final action by the Board, file a writ of mandate in the Superior Court to inquire into the validity of the action of the board" (California Water Code Sec. 1360).

Thus, if Petitioners believe there should have been restrictions in the United States' permit concerning delivery of water through the Folsom South Canal, they could have appeared before the State Board and raised such issues. If they were not satisfied with the decisions of the State Board in regard to the permits issued to the United States, the avenue of review by writ of mandate was available to them. However, no allegations have been made by Petitioners that there were any irregularities whatever in the State Board proceedings pursuant to which the United States obtained its permits to appropriate the waters of the American River. Although Petitioner Save the American River Association and the County of Sacramento participated in those proceedings, none of Petitioners sought reconsideration by the State Board or judicial review of its permit decisions. On the contrary, as noted previously the Association and the County both intervened in a separate state court action and supported the State Board's decision which fixed the downstream flow requirements for the United States' project. The time to seek review of the permit actions of the State Board has since lapsed (California Water Code Sec. 1360).

> The scope and technical complexity of issues concerning water resource management are unequaled by virtually any other type of activity present to the courts. What constitutes reasonable water use is dependent upon not only the entire circumstances presented but varies as the current situation changes. As this Court noted in *Joslin v. Marin Mun. Water Dist.* (1967) 67 Cal. 2d 132, 140 [60 Cal. Rptr. 377, 429 P 2d 889], 'What is a reasonable use of water depends upon the circumstances of each case, such an inquiry cannot be resolved *in vacuo* from statewide consideration of transcendent importance.' 20 C. 3d at 344; App. A of Petition at 22.

In conclusion, the California Supreme Court holds:

> When as in the instant case the statutory pattern regulating a subject matter integrates the administrative agency into the regulatory scheme and the subject of the litigation demands a high level of expertise within the agency's special competence, we are satisfied that *the litigation in the first instance must be addressed to the agency.* 20 C.3d at 344; App. A of Petition at 23. (Emphasis added.)

Although the California Court applied this exhaustion of administrative remedies requirement specifically to the "waste water" cause of action of Petitioners' Complaint, it is clear that allegations of unreasonable use, such as those asserted by Petitioners in regard to delivery of water to EBMUD through the Folsom South Canal must (as a matter of California law) be presented *first* to the California State Water Resources Control Board. To permit Petitioners' collateral attack, which bypasses the State

Board and is asserted for the first time at the state court level, would substantially defeat the integrity of the comprehensive scheme which the California Legislature has enacted for the administration of the appropriative water rights of the State.

Accordingly, the trial court correctly held that Petitioners have not stated a cause of action under Article X, Section 2, of the California Constitution, and the trial court's dismissal of the case has been properly affirmed by the California Supreme Court.

CONCLUSION

The California Supreme Court properly decided this case and did so in full compliance with the recent decision of this Court in *California v. United States*. The decision sustaining the trial court's dismissal of Petitioners' case should stand as rendered and the Petition for a writ of certiorari should be denied.

August 11, 1978.

Respectfully submitted,

JOHN B. REILLEY,
General Counsel,
ROBERT C. HELWICK,
Attorney.
East Bay Municipal Utility District.
Attorneys for Respondents.

(Appendices Follow)

Appendices

Appendix I

43 U.S.C. § 616aaa

AUBURN-FOLSOM SOUTH UNIT; SAN FELIPE DIVISION: CENTRAL VALLEY PROJECT, CALIFORNIA

§ 616aaa. Authorization for construction, operation, and maintenance; purpose; principal works.

For the principal purpose of increasing the supply of water available for irrigation and other beneficial uses in the Central Valley of California, the Secretary of the Interior (hereinafter referred to as the "Secretary"), acting pursuant to the Federal reclamation laws (Act of June 17, 1902; 32 Stat. 388, and Acts amendatory thereof or supplementary thereto), is authorized to construct, operate, and maintain, as an addition to, and an integral part of, the Central Valley project, California, the Auburn-Folsom South unit, American River division. The principal works of the unit shall consist of—

(1) the Auburn Dam and Reservoir with maximum water surface elevation of one thousand one hundred and forty feet above mean sea level, and capacity of approximately two and one-half million acre-feet;

(2) a hydroelectric powerplant at Auburn Dam with initial installed capacity of approximately two hundred and forty thousand kilowatts and necessary electric transmission system for interconnection with the Central Valley project power system: *Provided*, That provision may be made for the ultimate development of the hydroelectric capacity (now estimated at approximately 400,000

kilowatts) and such installation may be made when duly authorized by an Act of Congress: *Provided further,* That no facilities, except those required for interconnecting the Auburn powerplant and the Folsom switchyard and those interconnecting the Folsom switchyard and the Elverta substation, shall be constructed for electric transmission or distribution service which the Secretary determines, on the basis of a firm offer of a fifty-year contract from a local public or private agency, can be obtained at less cost to the Federal Government than by construction and operation of Government facilities;

(3) the Sugar Pine Dam and Reservoir;

(4) the County Line Dam and Reservoir;

(5) necessary diversion works, conduits, and other appurtenant works for the delivery of water supplies to projects on the Forest Hill Divide in Placer County and in the Folsom-Malby area in Sacramento and El Dorado Counties;

(6) the Folsom South canal and such related structures, including pumping plants, regulating reservoirs, floodways, channels, levees, and other appurtenant works for the delivery of water as the Secretary determines will best serve the needs of Sacramento and San Joaquin Counties: *Provided,* That the Secretary is authorized to include in such canal and related operating structures such additional works or capacity as he deems necessary and economically justified to provide

for the future construction of the East Side division of the Central Valley project, and the incremental costs of providing additional works or capacity in the Folsom South canal to serve the East Side division of the Central Valley project shall be assigned to deferred use for repayment from Central Valley project revenues. In the event that the East Side division is authorized, such costs shall be deemed a part of the cost of that division and shall be reallocated as the Secretary deems right and proper.

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43 U.S.C. § 616bbb

§ 616bbb. Financial and operational integration and coordination of unit and project; flood control.

Subject to the provisions of sections 616aaa to 616fff of this title, the operation of the Auburn-Folsom South unit, American River division, shall be integrated and coordinated, from both a financial and an operational standpoint, with the operation of other features of the Central Valley project, as presently authorized and as may in the future be authorized by Act of Congress, in such manner as will effectuate the fullest, most beneficial, and most economic utilization of the water resources hereby made available. Auburn and County Line Dams shall be operated for flood control in accordance with criteria established by the Secretary of the Army as provided for in section 709 of Title 33.

(c) Furnishing water to municipalities; sale of electric power; lease of power privileges.

The Secretary is authorized to enter into contracts to furnish water for municipal water supply or miscellaneous purposes: *Provided,* That any such contract either (1) shall require repayment to the United States, over a period of not to exceed forty years from the year in which water is first delivered for the use of the contracting party, with interest not exceeding the rate of 3½ per centum per annum if the Secretary determines an interest charge to be proper, of an appropriate share as determined by the Secretary of that part of the construction costs allocated by him to municipal water supply or other miscellaneous purposes; or (2) shall be for such periods, not to exceed forty years, and at such rates as in the Secretary's judgment will produce revenues at least sufficient to cover an appropriate share of the annual operation and maintenance cost and an appropriate share of such fixed charges as the Secretary deems proper, and shall require the payment of said rates each year in advance of delivery of water for said year. Any sale of electric power or lease of power privileges, made by the Secretary in connection with the operation of any project or division of a project, shall be for such periods, not to exceed forty years, and at such rates as in his judgment will produce power revenues at least sufficient to cover an appropriate share of the annual operation and maintenance cost, interest on an appropriate share of the

construction investment at not less than 3 per centum per annum, and such other fixed charges as the Secretary deems proper: *Provided* further, That in said sales or leases preference shall be given to municipalities and other public corporations or agencies; and also to cooperatives and other nonprofit organizations financed in whole or in part by loans made pursuant to the Rural Electrification Act of 1936. Nothing in this subsection shall be applicable to provisions in existing contracts, made pursuant to law, for the use of power and miscellaneous revenues of a project for the benefit of users of water from such project. The provisions of this subsection respecting the terms of sales of electric power and leases of power privileges shall be in addition and alternative to any authority in existing laws relating to particular projects. No contract relating to municipal water supply or miscellaneous purposes or to electric power or power privileges shall be made unless, in the judgment of the Secretary, it will not impair the efficiency of the project for irrigation purposes.

PUBLIC LAW 81—356; 63 STAT. 852

AMERICAN RIVER BASIN DEVELOPMENT, CALIFORNIA

CHAPTER 690—PUBLIC LAW 356

[H. R. 165]

An Act to authorize the American River Basin Development, California for irrigation and reclamation, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That:

The Central Valley project, California, authorized by section 2 of the Act of Congress of August 26, 1937 (50 Stat. 850), is hereby reauthorized to include the American River development as hereinafter described, which development is declared to be for the same purposes as described and set forth in the Act of Congress of August 26, 1937 (50 Stat. 850).

Sec. 2. The American River development shall consist of: Folsom Dam and Reservoir having a storage capacity of approximately one million acre-feet, to be constructed by the Corps of Engineers at such point below the confluence of the North Fork and the South Fork of the American River near the city of Folsom, California, as the Secretary of the Army and the Chief of Engineers after consultation with the Bureau of Reclamation and other appropriate State, Federal, and local agencies may find most advisable; and the following features for the development and use of water, to be constructed, operated, and maintained by the Secretary of the Interior through the Commissioner of Reclamation: A hydroelectric power plant with a generating capacity of approximately one hundred and twenty thousand kilowatts, and necessary hydroelectric afterbay power plants and necessary electric transmission lines to the nearest practical interconnection with the Central Valley project transmission system; a storage dam with a capacity of approximately forty thousand acre-feet to be located on Sly Park Creek, a tributary of the North Fork of Consumnas River, with necessary appurtenant works, including a diversion dam on Camp Creek, tunnel, conduit, and canals for the delivery of water to lands in El Dorado County, and incidental works appurtenant thereto. The Secretary of the Interior, through the Bureau of Reclamation, is hereby further authorized and directed to conduct the necessary investigations, surveys, and studies for the purpose of developing plans for disposing of the water and electric power which would be made available by the project, including studies of such supplemental works and equipment as may be required to maintain a firm supply of electric energy, and render reports thereon which would set forth the works required for such disposition, together with findings as to their engineering and financial feasibility, including a study of the water resources and requirements of the entire American River watershed and the areas serviceable therefrom, and particularly of a diversion canal at the highest feasible level extending southerly from Folsom Reservoir as will permit the maximum beneficial use of the water for irrigation of the lands lying under said canal in El Dorado and Sacramento Counties; a diversion canal at the highest feasible

level for the purpose of securing the maximum beneficial use of the water in Placer County extending northerly from such reservoir to a point on the Bear River in the vicinity of Sheridan, California, and a conduit or conduits with necessary pumping plans and supplemental works extending from the most feasible diversion point on the Central Valley project, California, to serve lands and municipalities in Contra Costa, Alameda, Santa Clara, San Joaquin, and San Benito Counties.

Nothing contained in this Act shall be construed by implication or otherwise as an allocation of water and in the studies for the purposes of developing plans for disposal of water as herein authorized the Secretary of the Interior shall make recommendations for the use of water in accord with State water laws, including but not limited to such law giving priority to the counties and areas of origin for present and future needs.

Said studies and the reports thereon shall be submitted to the proper State authorities under the procedure provided for in the Flood Control Act of 1944 (Public Law 534, Seventy-eighth Congress, second session).

Folsom Dam and Reservoir, upon completion of construction by the Corps of Engineers, to the extent where water from said reservoir is ready to be turned either into the power plant or conduits, shall be transferred to the Bureau of Reclamation for operation and maintenance under the supervision of the Secretary of the Interior together with the other features of the

American River development herein authorized for construction by the Bureau of Reclamation, all in accordance with the Federal reclamation laws (Act of June 17, 1902, 32 Stat. 388, and Acts amendatory thereof or supplementary thereto). After the transfer as provided herein, the dam shall be operated for flood control in accordance with criteria established by the Secretary of the Army as provided for in section 7 of the Flood Control Act of 1944 (Public Law 534, Seventy-eighth Congress, second session).

Sec. 3. In locating and designing the works authorized for construction by section 2 of this Act the Secretary of the Army and the Chief of Engineers, the Secretary of the Interior and the Commissioner of Reclamation shall give due consideration to the report set forth in Bulletin Number 26 of the Division of Water Resources of the Department of Public Works of the State of California, and shall consult the local interests to be affected by the construction and operation of said works, through public hearings or in such other manner as in their discretion may be found best suited to a maximum expression of the views of such local interests.

Sec. 4. The Secretary of the Interior is directed to cause the operation of said works to be coordinated and integrated with the operation of existing and future features of the Central Valley project in such manner as will effectuate the fullest and most economic utilization of the land and water resources of the Central Valley project of California for the widest possible public benefit.

Sec. 5. There are hereby authorized to be appropriated, out of any money in the Treasury not otherwise appropriated, such sums as are necessary to carry out the purposes of this Act.

Approved October 14, 1949.

CALIFORNIA WATER CODE

§ 1240. Appropriation for useful or beneficial purpose: Cessation of use

The appropriation must be for some useful or beneficial purpose, and when the appropriator or his successor in interest ceases to use it for such a purpose the right ceases.

Enacted 1943.

§ 1255. Rejection of application

The board shall reject an application when in its judgment the proposed appropriation would not best conserve the public interest.

§ 1257. Requirement that relative benefit be considered in acting on applications to appropriate water

In acting upon applications to appropriate water, the board shall consider the relative benefit to be derived from (1) all beneficial uses of the water concerned including, but not limited to, use for domestic, irrigation, municipal, industrial, preservation and enhancement of fish and wildlife, recreational, mining and power purposes, and any uses specified to be protected in any relevant water quality control plan, and (2) the reuse or reclamation of the water

sought to be appropriated, as proposed by the applicant. The board may subject such appropriations to such terms and conditions as in its judgment will best develop, conserve, and utilize in the public interest, the water sought to be appropriated.

§ 1300. Issuance and delivery of notice

As soon as practicable after the receipt of an application for a permit to appropriate water which conforms to the rules and regulations of the board and to law, the board shall issue and deliver a notice of the application (a) to the applicant, (b) to the district attorney of each county wherein the applicant proposes to divert water under the application, and (c) to the board of supervisors of each county wherein the applicant proposes to divert water under the application.

§ 1301. Matters to be specified in notice

The notice shall specify all of the following:

(a) The number of the application.
(b) The name and address of the applicant.
(c) The date of filing.
(d) The source of supply.
(e) The amount applied for.
(f) The season of diversion.
(g) The location of the point of diversion.
(h) The use to be made.
(i) The location of the place of use.
(j) The date of issuance of the notice.
(k) Such other information as the board deems necessary.

§ 1302. Statement as to filing of protests: Within 60 days or extension

If the application is for more than three cubic feet per second or for more than 200 acre-feet per annum of storage, the notice shall state that protests against the approval of the application may be filed within 60 days from the date of issuance of the notice or within such further time as the board may, for good cause shown, allow.

§ 1303. Statement as to filing of protests: Within 40 days or extension

If the application is for three cubic feet or less per second, or for 200 acre-feet or less per annum of storage, the notice shall state that protests may be filed within 40 days from date thereof or within such further time as the board may, for good cause shown, allow.

§ 1304. Information as to contents of protests

The notice shall contain appropriate general information as to what protests against the approval of the application shall contain in order to accord with the requirements of law and the rules and regulations of the board.

§ 1310. When publication of application required

If the application is for more than three cubic feet per second or for more than 200 acre-feet per annum of storage the notice of application shall be published in accordance with this article.

§ 1311. Publication by applicant upon receipt of notice

Upon receipt of notice of an application coming under this article, the applicant shall cause it to be published as directed by the Board.

§ 1312. Publication: Manner: Time: Expense

The notice shall be published at the expense of the applicant at least once a week for three consecutive weeks, commencing within 20 days of the date of issuance of the notice, in a newspaper having a general circulation and published within the county wherein the point of diversion lies, or, if there are points of diversion in more than one county, in each county in which a point of diversion lies.

§ 1313. Where no newspaper published in county

In case there is no newspaper published within the appropriate county publication shall be made in a newspaper having a general circulation within the county.

§ 1315. Proof of publication: Time for filing

Proof of publication shall be filed by the applicant within 60 days from the date of issuance of the notice.

§ 1316. Proof of publication: How made

Proof of publication shall be by copy of the notice as published attached to and made a part of the affidavit of the publisher or foreman of the newspaper publishing the notice.

§ 1317. Cancellation of application for failure to file proof of publication

The board may cancel any application for failure of the applicant to file proof of publication in accordance with this article, provided the board first gives the applicant written notice of such possible cancellation and 15 days in which to file proof of publication.

§ 1320. Notice by posting and mailing in accordance with article

Notice of an application for three cubic feet or less per second or for 200 acre-feet or less per annum of storage shall be given by posting and mailing in accordance with this article.

§ 1321. Mailing of copies to applicant and interested persons

Upon the date of issuance of notice of an application coming under this article the board shall mail three copies of the notice to the applicant by registered mail and shall also send a copy by registered mail to each person who is known to the board and who in its judgment is interested in the application because of ownership or location in the vicinity of the proposed appropriation.

§ 1322. Posting of notices by applicant

The applicant shall post the notice within 20 days of the date of issuance thereof in at least two conspicuous places in the locality to be affected by the proposed appropriation.

§ 1323. Proof of posting

Proof of posting shall be by affidavit of the applicant or the person posting notice on behalf of the applicant and shall be filed within 40 days from the date of issuance of notice.

§ 1324. Cancellation of application for failure to file proof of posting

The board may cancel any application for failure of the applicant to file proof of posting in accordance with this article, provided the board first gives the applicant written notice of such possible cancellation and 15 days in which to file proof of posting.

§ 1330. Right to file protest

Any person interested may, within the time allowed in the notice of application or within such further time as may, for good cause shown, be allowed by the board, file with it a written protest against the approval of an application.

§ 1360. Right to file petition for writ of mandate in superior court

Any person interested in any application may, within 30 days after final action by the board, file a petition for a writ of mandate in the superior court in and for the county in which the applicant seeks to divert water to inquire into the validity of the action of the board. If the applicant seeks to divert water in more than one county, the petition may be filed in any one of the counties. The right to petition shall not be affected by the failure to seek reconsideration before the board.

§ 1375. Facts required to exist

As prerequisite to the issuance of a permit to appropriate water the following facts must exist:

(a) There must be an applicant.

(b) The application must contain the matter and information prescribed by this division and be in the form required by the board.

(c) The intended use must be beneficial.

(d) There must be unappropriated water available to supply the applicant.

(e) All fees due must be paid.

Appendix II

(Letterhead of
State of California
Office of the Attorney General
Department of Justice
State Building, San Francisco 94102
(415) 557-0285)

April 2, 1976

Mr. Gale E. Bishel
Clerk
California Supreme Court
State Building
San Francisco, CA 94102

Re: Environmental Defense Fund, et al. v. East Bay Municipal Utility District, et al. S. F. 23422

Dear Mr. Bishel:

Enclosed herewith, pursuant to the Court's order of March 22, 1976, is a copy of California's brief in *United States v. California,* Ninth Circuit No. 75-3554, for use by the Court in this action.

There are a number of documents, judicially noticeable, which are discussed in the brief; if any of

those are not readily available to the Court, and if the Court so desires, we will provide copies for the Court's use.

Very truly yours,
Evelle J. Younger
Attorney General
/s/ Richard C. Jacobs
Richard C. Jacobs
Deputy Attorney General

RCJ :gj
cc: All parties, brief enclosed.
Received—Legal Dept. Apr. 7, 1976.